SUPREME COURT U S

Office-Supreme Court, U.S.
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JOHN F. DAVIS

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, ET AL.,
Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 17, 1967
CERTIORARI GRANTED OCTOBER 9, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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RELEVANT DOCKET ENTRIES

Trial Court

August 9, 1961.	Filed—Petition.
January 2, 1962.	Filed—Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number said Causes of Action.
March 2, 1962.	Filed—Journal Entry of Order of Court Overruling Defendants' Motion.
March 2, 1962.	Filed—Notice to the United States and its Various Agencies Named Below of the Pendency of the Above Action.
March 15, 1962.	Filed—Defendants' Amended Answer Containing Demurrer.
May 31, 1963.	Filed—Plaintiffs' Reply.
June 11, 1963.	Filed—Motion to Strike from Reply.
July 12, 1963.	Filed—Journal Entry of Order on July 1, 1963, Sustaining Demurrer and Allowing Time to Amend.
July 19, 1963.	Filed—Amended Petition.
August 5, 1963.	Filed—Motion to Strike from Amended Petition, Demurrer and Objection to Venue.
September 25, 1963.	Filed—Journal Entry of Order Sustaining Demurrer and Judgment Dismissing Cause on September 20, 1963, Showing Notice of Appeal Given in Open Court on September 20, 1963.

DOCKET ENTRIES (CONTINUED)

Supreme Court of Oklahoma

November 15, 1963.	Filed—Petition in Error with Case Made Attached.
March 23, 1964.	Filed—Motion of Defendant in Error to Dismiss Appeal.
July 7, 1964.	Filed—Opinion—Journal Entry—Motion Denied—Berry, J.
May 24, 1966.	Filed—Opinion—Affirmed—Per Curiam.
June 7, 1966.	Filed—Order Granting to June 23, 1966, to File Petition for Rehearing.
June 17, 1966.	Filed—Application for Extension of Time to File Petition for Rehearing.
June 21, 1966.	Filed—Order Granting to July 8, to File Petition for Rehearing.
July 5, 1966.	Filed—Petition for Rehearing.
December 20, 1966.	Filed—Journal Entry of Order Denying Petition for Rehearing.
February 1, 1967.	Filed—Motion to Stay Mandate, and Order Staying Mandate.
February 1, 1967.	Filed—Notice of Appeal to United States Supreme Court for Writ of Certiorari.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

PETITION

Come now the Plaintiffs, and for cause of action against the Defendant, alleges and states:

1. That the Defendant, Skelly Oil Company, is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Oklahoma and it maintains its principal office and place of business in Tulsa, Oklahoma; the service agent of Defendant is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

2. The Plaintiffs are now and have been at all times hereinafter mentioned, the owners of a trust patent to the surface and all oil, gas and other minerals and mineral rights thereunder, and in possession of the following described real property situated in Stephens County, State of Oklahoma, to wit:

> The Southeast quarter of Section Three in Township Two North of Range Eight West of the Indian Meridian, containing 160 acres.

That said lands are being held in trust by the United States Government, under the General Allotment Act of February 8, 1887, as amended, and said lands are under the jurisdiction and control of the Secretary of the Interior of the Department of Interior acting by and through the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, and the Commissioner of Indian Affairs.

3. That on May 28, 1947, the Plaintiffs, Frank Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, and John T. Montgomery, Superintendent, Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor, (now of age), as Lessors, made, executed and delivered to Skelly Oil Company, as Lessee, a Departmental oil and gas lease covering the above described tract. That on June 27, 1947,

said oil and gas lease was approved by J. W. Hutchison, Acting Commissioner of Indian Affairs of the United States Department of Interior. That said Skelly Oil Company also executed said oil and gas mining lease. A true and correct copy of said lease with all the endorsements thereon is hereto attached Marked Exhibit "A" and made a part hereof for all purposes. That the primary term of said lease was for a period of ten years, from the approval date of the Secretary of Interior, which period expired on June 27, 1957, and contained a provision that said lease would remain in full force and effect as much longer thereafter as oil and gas was produced in paying quantities from said land.

4. That during the year of 1956 Skelly Oil Company drilled seven oil and gas producing wells on said lands on 20-acre spacing, all of which wells have been dually completed. That shortly after said wells had been completed as commercial producers for oil and gas purposes upon said lands, demand was made by the Plaintiffs hereon on Skelly Oil Company to market the gas being produced and flared from said wells, there being a gas line operated by Lone Star Gas Company within one-half mile of said lands. That said Defendant failed and refused to market said gas and in addition thereto failed and refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That Defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has committed waste in the premises in direct violation of the express terms, conditions and covenants of the aforesaid oil and gas mining lease attached hereto as Exhibit "A", and in violation of the Conservation Statutes of the State of Oklahoma, Title 52 OSA Sec. 86.3.

5. That as a direct and proximate result of the aforesaid wrongful and illegal conduct of Defendant, Plaintiffs have been damaged in the loss of royalty, resulting from the waste occasioned by the wrongful and illegal oper-

ations of said written oil and gas mining lease (Exhibit "A" hereto) in the amount of One Hundred Fourteen Thousand Dollars ($114,000.00). That all of such damages are the direct and proximate result of the breach of said written agreement and covenant as aforesaid, as of this date.

Plaintiffs reserve the right to amend, at the date of trial hereof, and to set forth any additional damages which may have resulted in any continuous damages in the premises.

WHEREFORE, premises considered, Plaintiffs pray for judgment against Defendant in the amount of One Hundred Fourteen Thousand Dollars ($114,000.00), with interest and costs, and for such additional amount of damages which may have accrued at the date of trial, and for such other relief as Plaintiffs may be entitled to have as by law provided. Attorneys lien reserved.

/s/ HOUSTON BUS HILL

HOUSTON BUS HILL
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma

/s/ CHARLES HILL JOHNS

CHARLES HILL JOHNS
Cravens Building
Oklahoma City 2, Oklahoma

ATTORNEYS FOR PLAINTIFFS

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA, SS:

Carl Poafpybitty, of lawful age, being first duly sworn, upon oath deposes and says: That he is one of the Plaintiffs herein named; that he has read the above and foregoing Petition, knows the contents thereof, and that the same are true and correct.

/s/ Carl Poafpybitty

Carl Poafpybitty

Subscribed and sworn to before me, this 12th day of July, 1961.

(SEAL)

/s/ Theodora E. Devlin
Notary Public

My Commission Expires: 10-19-63.

ENDORSED:

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG. 9 1961
DALE SMITH, COURT CLERK
By W. H. REGIAN, Deputy

Form 5-151 b
(September 1942)

Tr. 167

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS I-51-Ind-43310

OIL AND GAS MINING LEASE—ALLOTTED INDIAN LANDS

LESSEE'S COPY

COMANCHE TRIBE, STATE OF OKLAHOMA

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 28th day of May 1947, 19__, by and between Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, adults born in 1914, 1916, 1919, and 1921, respectively, and John T. Montgomery, Supt. Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor male born in 1928, heirs of Eh-toh-wed-di (Probate 13207-34),

of Kiowa Indian Agency, State of Oklahoma, allottee No. 2660

(roll No. _____), of the Comanche Tribe of Indians, designated herein as

lessor, and Skelly Oil Company

Box 1650

of Tulsa 2, State of Oklahoma, herein designated as

lessee:

23353-7

WITNESSETH

1. Lessor, in consideration of a cash bonus of $ 2860.60 paid to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, receipt of which is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Stephens State of Oklahoma, and more particularly described as follows:

The Southeast quarter of Section Three in Township Two North of Range Eight West of the Indian Meridian,

RECEIVED

containing 160 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(b) Wells.—(1) To drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage: *Provided*, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior; (2) at the election of the lessee to drill and produce other wells: *Provided*, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (3) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified.

(1)

16—47884-4

"Exhibit A"

(c) **Rental and royalty.**—To pay, beginning with the date of approval of the lease by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided*, That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further*, That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in sections 8 (a) and 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(d) **Monthly statements.**—To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

(e) **Log of well.**—To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lessee showing the strata and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.

(f) **Diligence, prevention of waste.**—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(g) **Regulations.**—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: *Provided*, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.

(h) **Assignment of lease.**—Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

4. The lessor expressly reserves:

(a) **Disposition of surface.**—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lessee herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.

(b) **Use of gas.**—The right to use sufficient gas free of charge for all stoves and inside lights in the principal dwelling house on said lands by making connection at his own expense with the well or wells thereon, the use of such gas to be at the lessor's risk at all times.

(c) **Royalty in kind.**—The right to elect on 30 days' written notice to take lessor's royalty in kind.

5. **Surrender and termination.**—The lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of the sum of one dollar and all rentals, royalties, and other obligations due and payable to the lessor; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lessee shall file a recorded release with his application to the superintendent for termination of this lease.

6. **Cancelation and forfeiture.**—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided*, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.

7. **Removal of buildings, improvements, and equipment.**—Lessee shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material, and/or equipment placed thereon for the purpose of development and operation hereunder, save and except casing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all casing in wells, material, structures, and equipment shall be and become the property of the lessor.

8. **Relinquishment of supervision by the Secretary of the Interior.**—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as provided in section 3 (c). After notice of relinquishment has been received by lessee, as herein provided, this lease shall be subject to the following further conditions:

(a) All rentals and royalties thereafter accruing shall be paid in the following manner: Rentals and royalties shall be paid directly to lessor or his successors in title, or to a trustee appointed under the provisions of section 9 hereof.

(b) If, at the time supervision is relinquished by the Secretary of the Interior, lessee shall have made all payments then due hereunder, and shall have fully performed all obligations on its part to be performed up to the time of such relinquishment, then the bond given to secure the performance hereof, on file in the Indian Office, shall be of no further force or effect.

(c) Should such relinquishment affect only part of the acreage, then lessee may continue to drill and operate the land covered hereby as an entirety: *Provided*, That lessee shall pay in the manner prescribed by section 3 (c), for the benefit of lessor such proportion of all rentals and royalties due hereunder as the acreage retained under the supervision of the Secretary of the Interior bears to the entire acreage of the lease, the remainder of such rentals and royalties to be paid directly to lessor or his successors in title or said trustee as the case may be, as provided in subdivision (a) of this section.

9. **Division of fee.**—It is covenanted and agreed that should the fee of said land be divided into separate parcels, held by different owners, or should the rental or royalty interests hereunder be so divided in ownership, after the execution of this lease and after the Secretary of the Interior relinquishes supervision hereof, the obligations of lessee hereunder shall not be added to or changed in any manner whatsoever save as specifically provided by the terms of this lease. Notwithstanding such separate ownership, lessee may continue to drill and operate said premises as an entirety: *Provided*, That each separate owner shall receive such proportion of all rentals and royalties accruing after the vesting of his title as the acreage of the fee, or rental or royalty interest, bears to the entire acreage covered by the lease; or to the entire rental and royalty interest as the case may be: *Provided further*, That if, at any time after departmental supervision hereof is relinquished, in whole or in part, there shall be four or more parties entitled to rentals or royalties hereunder, whether said parties are so entitled by virtue of undivided interests or by virtue of ownership of separate parcels of the land covered hereby, lessee, at his election may withhold the payment of further rentals or royalties (except as to the portion due the Indian lessor while under restriction), until all of said parties shall agree upon and designate in writing and in a recordable instrument a trustee to receive all payments due hereunder on behalf of said parties and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole risk of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title.

10. **Drilling and producing restrictions.**—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

11. **Unit operation.**—The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

12. **Helium—public emergency.**—It is covenanted and agreed that helium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing helium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the option to purchase all or any part of the products produced under this lease.

13. **Conservation.**—The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.

14. **Heirs and successors in interest.**—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Two witnesses to execution by lessor:

Ruth Hunt

P. O. [illegible]

Ethel A. Bitsa

P. O. [illegible]

RECEIVED JUN 1 3 1947 KIOWA AGENCY

[illegible] [SEAL]

[illegible] [SEAL]

[illegible]

Supt. Kiowa Indian Agency, for and on behalf of minor mentioned in face of this instrument.

Two witnesses to execution by lessee:

Robt T. Buchanan

P. O. Tulsa, Oklahoma

John Reidy Jr.

P. O. Tulsa, Oklahoma

SKELLY OIL COMPANY [SEAL]

By _____
Vice President

Attest: _____
Assistant Secretary

STATE OF Okla. }
COUNTY OF Caddo } ss.:

Before me, a notary public, on this 2nd day of June 1947 19__, personally appeared Frank Poafybitty, Carl Poafybitty, Thompson Poafybitty, Louise Poafybitty, and John T. Montgomery, Supt. Kiowa Indian Agency, for and on behalf of Laverne Aitson, a male minor,

to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires June 30, 1948

Fred R. Nichols, Notary Public.

UNITED STATES
DEPARTMENT OF THE INTERIOR

Chicago, Ill. JUN 27 1947 19__

The within lease is hereby approved.

(Sgd.) J. W. HUTCHISON
Acting Commissioner of Indian Affairs.

Filed for record this _____ day of _____, 19__, at _____ o'clock ___m.

By _____

Rental received, $_____

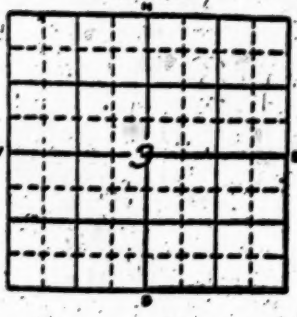
U. S. GOVERNMENT PRINTING OFFICE 16—17202-4

Form 9-1196

KIOWA

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
LEASE REPORT

Lease No. 43810



S. 3 T. 2 S. R. 8 W. Lease appr. 8-27-47

Allottee Mih-rah-wad-di, Comanche 2660

Lessee Shelly Oil Company

Operator Shelly Oil Company

Field Marlow District

Total number wells drilled 5 (No. 6 drilling)

AVERAGE DAILY LEASE PRODUCTION			
Oil (bbl.)	Water (bbl.)	Dry gas (cu. ft.)	C. H. gas (cu. ft.)
295	None	None	Vented - not measured

Is oil or gas used on lease? No On adjacent leases? No

Consignee: Oil Rock Island Oil & Ref. Dry gas --- C. H. gas ---

Number, type, and size of stock tanks 3 - 500 bbl. - steel bolted. 3260, 3261 and 3867. 3 - 500 bbl. with no numbers.

Regulations complied with: 2a. Y 2c. Y 2d. X 2e. See Remarks 2f. Y 2e. Y 2q. Y 2r. See Remarks 2s. X 2w. Y

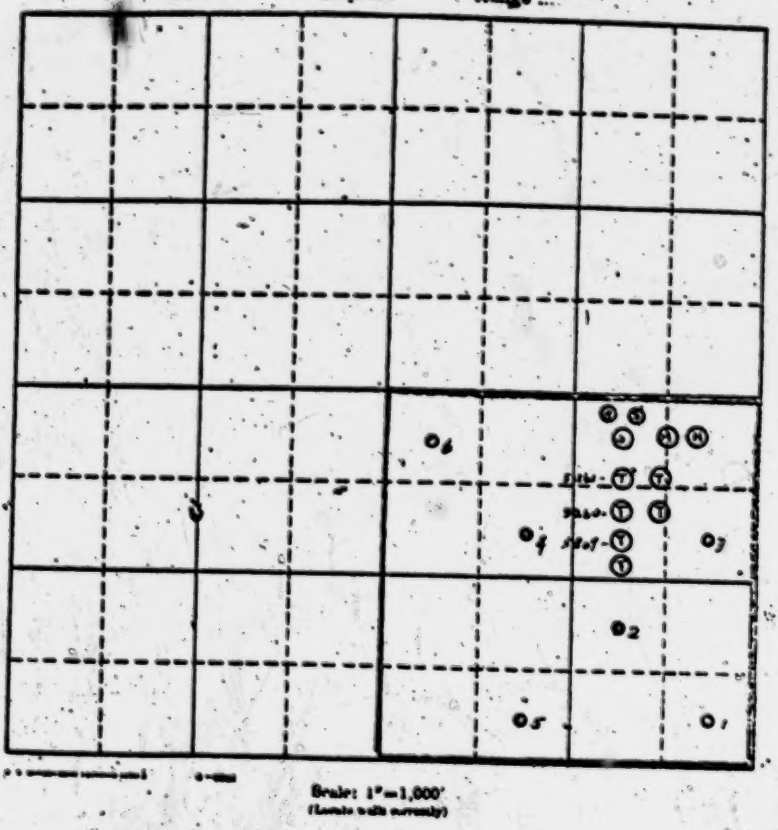
Well No.	Oil, gas, dry, water	Flowing, pumping, gas lift, gas, or water or nothing	Number of tubing, casing, or none	If shot, date	PRESENT PRODUCTION: Casing pressure	Daily average oil or gas production	Daily average amount of water produced	PRODUCTIVE ZONES: Formation	Top of producing formation	Bottom of producing formation	Plugged back depth
1	Oil	F	Dual Compl.		550	27	0	L. Heath	6070	6090	
1	Oil	F				33	0	U. Griffin	6624	6634	8730
2	Oil	F	Dual Compl.		No Gage	33	0	U. Griffin	6556	6564	8735
2	Gas	S.I.				I.P. 3000 MCF/D	0	L-Cleo	7053	7075	
3	Oil	F	Dual Compl.		1700	33	0	U. Griffin	6666	6675	8760
3	Oil	F				37	0	Miss (Lime)	7479	7491	PB 8750
4	Oil	F	Dual Compl.		1900	33	0	Cregory	6612	6630	7505
4	Oil	F				37	0	Miss	7448	7458	
5	Oil	F	Dual Compl.		1200	33	0	Griffin	6536	6555	7520
5	Oil	F				37	0	Reed	7251	7264	

Nov. 2, 1957

M. M. Shuster

REMARKS: Wells all flowing. Lease clean up was very good. No coal or zone signs on Well No. 5. Considerable gas blowing to air from four vents north of tanks. Company reports no market for this gas. Lone Star Gas Company may lay a gathering line.

Sec. 3 Twp. 2 N. Range 8 W.



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PAGE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

* * * * * *

MOTION TO REQUIRE PLAINTIFFS TO ELECT AS BETWEEN TWO SEPARATE CAUSES OF ACTION AND IN THE ALTERNATIVE TO SEPARATELY STATE AND NUMBER SAID CAUSES OF ACTION

Comes now the defendant and leave of court first obtained:

1. Moves the Court to require plaintiffs to elect whether they will proceed herein upon

(a) The asserted cause of action upon contract to market and pay royalty upon casinghead gas emitted from said wells, or

(b) The asserted cause of action in tort for alleged wrongful flaring and alleged wasting of said casinghead gas.

2. In the alternative and if the above and foregoing Motion be denied, this defendant moves the Court to require plaintiffs to separately state and number the separate causes of action above described which are commixed and commingled in plaintiffs' Petition herein.

Respectfully submitted,

SKELLY OIL COMPANY, a corporation

By /s/ S. W. Wells

S. W. Wells
P. O. Box 1650
Tulsa, Oklahoma

By /s/ John H. Cantrell

John H. Cantrell
2120 First National Building
Oklahoma City, Oklahoma

Attorneys for Defendant

CERTIFICATE OF SERVICE

Copies mailed to the attorneys of record for plaintiffs this 2nd day of January, 1962.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Jan 2 1:46 PM '62
DALE SMITH, COURT CLERK
BY RON HOWLAND

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

JOURNAL ENTRY

Now on this 2nd day of March, 1962, there coming on to be heard the Motion of the defendant to require plaintiffs to elect as between two separate causes of action or in the alternative to separately state and number said causes of action, and upon agreement of the parties and for good cause shown,

IT IS HEREBY ORDERED as follows:

1. The following language: "and in violation of the Conservation Statutes of the State of Oklahoma, Title 52 O.S.A. Sec. 86.3.", as same appears in the final sentence of numerical paragraph 4 of said Petition, be and the same is hereby stricken from the Petition of the plaintiffs herein;

2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition and that only recovery in contract will be sought in this action by

plaintiffs, the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative Motion of said defendant to require separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason; and

3. Defendant's application for leave to file an Amended Answer in this cause within fifteen (15) days from this date is hereby granted with plaintiffs to have ten (10) days thereafter within which to file their Reply thereto.

/s/ A. P. VAN METER
DISTRICT JUDGE

O.K. /s/ Charles Hill Johns
/s/ Houston Bus Hill, Attorneys for Plaintiffs

O.K. /s/ John H. Cantrell
/s/ S. W. Wells, Attorneys for Defendant.

ENDORSED: FILED, DISTRICT COURT, OKLAHOMA COUNTY, OKLA. Mar 2 9:48 AM '62. DALE SMITH, COURT CLERK By Dan Gray

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

NOTICE TO THE UNITED STATES AND ITS VARIOUS AGENCIES NAMED BELOW OF THE PENDENCY OF THE ABOVE ACTION

TO: United States of America,
Department of the Interior
Washington, D. C.

Secretary of the Interior,
United States of America,
Washington, D. C.

Commissioner of Indian Affairs,
United States of America,
Washington, D. C.

Superintendent, Kiowa Indian Agency,
Anadarko, Oklahoma

Area Director of the Bureau of Indian Affairs,
Anadarko, Oklahoma

Area Field Representative Kiowa Indian Agency,
Anadarko, Oklahoma

Andrew F. Potter,
Oklahoma City, Oklahoma

Gentlemen:

You and each of you are hereby notified that on the 9th day of August, 1961, the above styled and numbered cause was instituted in the District Court of Oklahoma County, Oklahoma, by the plaintiffs above named, by their counsel of record, Houston Bus Hill and Charles Hills Johns, Attorneys of Oklahoma City, Oklahoma, against the defendant above named, Skelly Oil Company, a corporation, and Summons was thereafter duly served upon said defendant.

Said action is now pending but is not at issue and is yet not set for trial. A copy of the Petition of the plaintiffs in said cause, a copy of defendant's Motion to Make More Definite and Certain and Demurrer Thereto, a copy of defendant's present Answer to plaintiffs' Petition, a copy of plaintiff's Reply to said Answer, and a copy of defendant's pending Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number said Causes of Action is attached hereto for your information.

Briefly stated, said plaintiffs, lessors in a departmental lease (dated May 28, 1947) of allotted Indian lands (Comanche Allottee 2660) being the Southeast Quarter (SE¼) of Section Three (Sec. 3), Township Two North (T 2 N), Range Eight West (R 8 W), Stephens County, Oklahoma (your lease number 1-51-Ind-43810) are suing defendant to recover royalties and/or damages for casinghead gas allegedly "flared" by defendant in the course of its operations of said lease. The suit seeks to recover the stated amount of $114,000.

It is thought that these restricted Indians have no proper right or standing to maintain and prosecute this action and you are hereby given notice of the pendency of such suit and said contention of this defendant and you will govern yourselves accordingly.

It will be appreciated if you will advise us of your decision as to whether you will take any action and if so, what, as soon as the decision has been made.

Respectfully,

SKELLY OIL COMPANY

By /s/ S. W. Wells

S. W. Wells,
Skelly Oil Company,
P. O. Box 1650,
Tulsa 2, Oklahoma

By /s/ John H. Cantrell

John H. Cantrell,
2120 First National Building
Oklahoma City 2, Oklahoma

Attorneys for Skelly Oil Company in said cause.

AFFIDAVIT OF MAILING

I, S. W. WELLS, one of the attorneys for the defendant in the case of "Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, Plaintiffs, vs. Skelly Oil Company, a corporation, Defendant, No. 154,040 in the District Court of Oklahoma County, State of Oklahoma," hereby certify that on the 28th day of February, 1962, I served the attached "Notice to the United States and Its Various Agencies of the Pendency of the Above Action" and the following instruments: a copy of Plaintiffs' Petition in said cause; copy of defendant's Motion to Make More Definite and Certain and Demurrer Thereto; copy of defendant's present Answer to Plaintiffs' Petition; copy of plaintiffs' Reply to said Answer; and a copy of defendant's pending Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number Said Causes of Action; on:

United States of America,
Department of the Interior,
Washington, D. C.

Secretary of the Interior,
United States of America,
Washington, D. C.

Commissioner of Indian Affairs,
United States of America,
Washington, D. C.

Superintendent Kiowa Indian Agency
Anadarko, Oklahoma

Area Director of the Bureau of Indian Affairs,
Anadarko, Oklahoma

Area Field Representative Kiowa Indian Agency
Anadarko, Oklahoma

Andrew F. Potter
United States District Attorney,
Oklahoma City, Oklahoma

by depositing copies of each, addressed as shown above, in the United States Registered Mails, postage prepaid, return receipt requested.

/s/ S. W. Wells

S. W. Wells

CERTIFICATE OF SERVICE UPON COUNSEL

Copies of the above Notice served upon counsel of record herein for the plaintiffs above named on the 2nd day of March, 1962, by mailing same in envelopes properly addressed to

1. Houston Bus Hill
   Attorney at Law
   Liberty Bank Bldg.,
   Oklahoma City, Oklahoma

and

2. Charles Hill Johns
   Attorney at Law
   Cravens Building
   Oklahoma City, Oklahoma

with postage fully prepaid.
Dated 3/2/62.

/s/ John H. Cantrell
Law Dept. Aug 10, 1961

[Exhibits Excluded]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

AMENDED ANSWER CONTAINING DEMURRER

DEMURRER

Comes now the defendant, Skelly Oil Company, a corporation, and demurs to the Petition of the plaintiffs herein as amended and for the several grounds thereof states:

1. Plaintiffs have no capacity to maintain this action;

2. Plaintiffs have no legal title to the chose in action sought to be asserted by them;

3. The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that plaintiffs are not the proper parties to institute and maintain this suit;

4. The said Petition shows on its face that plaintiffs cannot recover in this action;

5. Plaintiffs are not the real parties in interest within the intent, meaning and contemplation of the Oklahoma Statutes prescribing who may institute and maintain an action of this kind;

6. Said Petition shows on its face that conditions precedent to recovery upon the contract sued on have not been performed;

7. Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against the defendant; and

8. Said Petition shows on its face that the applicable statute of limitation as contained in 12 O.S.A. Section 95 bars recovery by plaintiffs.

Amended Answer

For its Amended Answer to Plaintiffs' Petition as amended defendant alleges and states:

1. Defendant incorporates in this Answer the same as if repeated and set out in full herein each, every and all of the statements hereinabove contained in the Demurrer of this defendant;

2. Defendant denies each and every material allegation in plaintiffs' Petition except such as may be hereinafter expressly admitted;

3. Defendant admits the allegations of paragraph 1 of plaintiffs' Petition;

4. Defendant admits that the plaintiffs are owners of the surface and mineral rights thereunder of certain property as described in paragraph 2 of plaintiffs' Petition. Defendant also admits that under applicable and controlling law plaintiffs are restricted Indians, wards of the government of the United States and that the United States of America, acting by and through the Secretary of the Interior and the designated officers, agents, subordinates and supervisors, has and has had exclusive control of Lessors' interest in and under said Lease and the real estate described therein, and otherwise also as stated in the said Lease, copy of which is attached to the Petition of the plaintiffs herein;

5. Defendant admits the allegations of paragraph 3 of the Petition and that it is the owner of the oil and gas lease referred to therein. In this connection, the defendant alleges that said lease is valid, subsisting, and has been maintained in force and effect by production of oil and/or gas from the leased premises in paying quantities and the payment of royalties thereon since the completion of the first well thereon during the year 1956;

6. Defendant admits that it has drilled seven (7) producing oil and gas wells on the lands in question and that

the first of said wells was completed during the year 1956, but specifically denies all other allegations contained in paragraph 4 of the petition;

7. Defendant has operated under said lease in accordance with the terms thereof without objection upon the part of the aforesaid authorized agents and officers of the United States of America and with their consent and express and tacit approval and with full knowledge upon the part of said agents and officers as well as of the plaintiffs herein, and without demand or requirement for change thereof or therein, and in which operations said United States and said agents and officers as well as said plaintiffs have fully concurred and acquiesced, and which operations by defendant and the benefits thereof said parties and each of them have elected to accept, approve and receive;

8. Under the compulsion of the covenants and commitments of said lease, express and implied, and under the authority of the said agents and officers and thus of the United States as aforesaid this defendant has continuously produced oil under said lease and has accounted for and paid the royalty due thereon including royalty upon any and all gas produced, saved, marketed or used off the premises and/or not used in the reasonable, necessary and said approved manner by defendant in the operation of said lease and lease hold;

9. For all oil, gas and hydrocarbons produced from the wells on said lease as to which royalty was and is payable under the terms of said lease, this defendant has truly accounted, by monthly statements in writing, as required by said lease, and the royalty shown thereon by it to be payable has been duly paid to and accepted, received and retained by the ones entitled thereto with full knowledge of the pertinent facts without objection or refusal and without demand that defendant change or alter its mode of operations. Said monthly written statements have been accepted as correct, and at no time has either

the United States, or its said designated agents, supervisors or officers or any or all of plaintiffs elected or sought to elect to take and receive in kind any oil, gas or hydrocarbons produced from said wells, or either or all of them, as the royalty payable under said lease for any such production. By virtue of the above and foregoing facts there has been a complete, sufficient and acequate waiver upon the part of the United States and its said wards, the plaintiffs, of any right to a different method or manner of operations than those carried on by defendant any of any right of additional royalties more than those so reported and paid and of any right to any damages on account of said operations. In this connection and because of the above recited facts and the acceptance and retention of the benefits thereof by plaintiffs, their said guardian and said officers and agents and by their laches, defendant asserts that the plaintiffs, and separately their said guardian, its agents and officers sanctioned the operations on said lease property and are each and all estopped to deny that any gas used by this defendant on the lease and in the course of its operations was and is "royalty free"; and separately are estopped to deny that any gas unavoidably lost was and is "royalty free";

10. At all times defendant acted in a reasonable and prudent manner and as a reasonable and prudent oil and gas operator in seeking a market upon fair and just terms for all oil, gas and hydrocarbons produced and to be lawfully produced on said lease and from said wells and for any such time as any such product was not marketed this defendant was unable to find and establish such a reasonable, fair and just market therefor. During any such time as any of the aforementioned products were not marketed, the defendant diligently pursued and endeavored to secure a market for the products which was reasonable, fair and to the best interests of all concerned and has not succeeded in so doing; and

11. The applicable statutes of limitation as contained in 12 O.S.A. Section 95 bar any recovery by plaintiffs in

this action. In this connection defendant says that there can be no recovery of any amount or amounts accruing more than five, three and two years respectively preceding the filing of this action.

WHEREFORE having fully answered, defendant asks that this cause be dismissed, and that defendant be discharged with its costs.

SKELLY OIL COMPANY, a corporation

By /s/ S. W. Wells

S. W. Wells
P. O. Box 1650
Tulsa 2, Oklahoma

/s/ John H. Cantrell

John H. Cantrell

/s/ CANTRELL, DOUGLASS, THOMPSON & WILSON

CANTRELL, DOUGLASS, THOMPSON & WILSON
2120 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 15th day of March, 1962, I served the above and foregoing Amended Answer Containing Demurrer in the above case upon the plaintiffs in said cause by mailing to counsel of record for said plaintiffs in said cause, in envelopes properly addressed and with postage thereon fully prepaid, true and correct copies of said "Amended Answer Containing Demurrer" as follows to-wit:

Houston Bus Hill
Attorney at Law
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma
and

Charles Hills Johns
Attorney at Law
Cravens Building
Oklahoma City 2, Oklahoma

Dated this 15th day of March, 1962.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Mar 15 12:50 PM '62

DALE SMITH, COURT CLERK

BY DAN GRAY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

REPLY

COME NOW plaintiffs and for reply to the amended answer of defendant, allege and state:

1. Plaintiffs deny each and every material allegation of new matter pleaded in the amended answer of defendant.

2. Plaintiffs allege and show to this Honorable Court that the United States of America has authorized the institution of this action and has consented to plaintiffs proceeding herein against defendant, all as is set forth in a certain contract and power of attorney executed and approved by the United States of America, a copy of which is hereto attached marked Exhibit "A" and made a part hereof.

WHEREFORE, plaintiffs pray that upon a trial hereof they have judgment as prayed for in their petition.

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ Charles Hill Johns
CHARLES HILL JOHNS

Attorneys for Plaintiffs

A copy of the within and foregoing reply was mailed to Mr. John H. Cantrell, Attorney at Law, 2120 First National Building, Oklahoma City 2, Oklahoma, Attorney for defendant herein, this 31st day of May, 1963.

/s/ Charles Hill Johns

EXHIBIT "A"

CONTRACT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, FRANK POAFPYBITTY, THOMPSON POAFPYBITTY, CARL POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON, Comanche Indians of Southwestern Oklahoma, have made, constituted, and appointed, and by these presents do make, constitute, and appoint HOUSTON BUS HILL, Attorney at 1412 Liberty Bank Building, Oklahoma City 2, Oklahoma, our true and lawful attorney for each of us, and in our name, place, and stead, and for each of us, to represent each of us in connection with the claim for damages against the Skelly Oil Company, which Company has been flaring and wasting gas from an oil and gas lease and Leasehold estate described as

SE4 Section 3, T-2-N, R-3-W, Stephens County, Oklahoma, since approximately 1956.

That the Skelly Oil Company has been operating the above described oil and gas lease and leasehold estate upon which there are seven wells, six of which have been duly

completed and one singly completed on 20-acre spacing. That repeated demands were made upon Skelly Oil Company to market said gas in order that the above owners would receive their proportionate part of the gas being flared and wasted, *by* Skelly Oil Company refused to do so to the damage of the undersigned owners. That we are unable to determine the amount and extent to which we have been damaged as a result of the waste and flaring of the gas from said leasehold estate and you have been working with us on this matter since April, 1960. We desire to have a suit instituted against Skelly Oil Company for the purpose of recovering any damage to which we are entitled and prosecute the same to a final conclusion. In this connection, we will probably need the service of a Petroleum Engineer and your compensation will be sufficient to take care of him.

You, Houston Bus Hill, are hereby authorized as our true and lawful attorney for each of us and in our name, and stead, and each of us hereby give you the full power to do everything whatsoever necessary and requisite to be done to institute suit against Skelly Oil Company and recover any damages to which we are entitled to our proportionate part as a result of the flaring and wasting of the gas and other hydrocarbons from the above described oil and gas lease and leasehold estate which we own, as fully as if each of us could do if personally present, with full power of substitution and revocation and further authorize you to appear before the Area Office of the Bureau of Indian Affairs at Anadarko, Oklahoma, the Department of Interior, the U.S.G.S., the Secretary of Interior, any of the State Courts, or the Supreme Court of the State of Oklahoma, the United States District Courts, and the United States Circuit Court of Appeals, for the purpose of prosecuting our claim as hereinabove set forth against Skelly Oil Company with full authority to negotiate, confer with all government agencies or representatives of the Bureau of Indian Affairs, the Area Office, and the Secretary of Interior, and obtain any information, files, or records pertinent to our claims.

In consideration of the services which you have rendered and which you are going to render in connection with the foregoing, we, the undersigned, Frank Poafpybitty, Irene Poafpybitty, Thompson Poafpybitty, Carl Poafpybitty, Louise Poafpybitty, and LaVerne Aitson, agree that if you are successful in recovering damages in the form of money in connection with the prosecution of our claim against the Skelly Oil Company, for gas and other hydrocarbons flared and wasted from our oil and gas lease and leasehold estate above described, since 1956, down to date to which we are entitled as royalty owners and/or lessors, we, and each of us, hereby agree to pay and have assigned over to you 40% of any sums of money should you be successful in recovering same for us through negotiations without the necessity of a law suit. Should it be necessary for you to file a damage suit against Skelly Oil Company either in the State Court or the United States District Court and you are successful in the prosecution thereof in recovering damages in the form of money for us, then we, and each of us, hereby agree to pay and have assigned over to you 50% of any sums of money so recovered for us. That should you have to prosecute our claim before the Supreme Court of the State of Oklahoma or before the Circuit Court of Appeals, then you agree to prosecute same on the basis of 50% being paid to you of whatever sums of money you are successful in recovering for us.

It is specifically understood and agreed that we will pay the Court costs and the printing of any Briefs in connection with the prosecution of our claim; and it is further understood that you are to take care of the Petroleum Engineer and any other expert assistance which you may need in the prosecution of this action.

It is further understood that if you are unsuccessful in your efforts to recover any money or damages arising out of our claim against Skelly Oil Company for flaring and wasting gas and other hydrocarbons from the above de-

scribed oil and gas lease and leasehold estate then you will receive no compensation for your services.

It is further understood that any money which you may recover for us will be paid in accordance with the directions of the Area Office of the Bureau of Indian Affairs at Anadarko, Oklahoma. Should the money be required to be paid into the Area Office, then that office will pay your fee for services rendered pursuant to this Contract and Power of Attorney and the remainder of said money, if any, will be disbursed to the undersigned in proportion to their interest in said oil and gas lease and leasehold estate.

You agree to faithfully, diligently, and carefully prosecute this claim for damages against the Skelly Oil Company to a conclusion on behalf of the undersigned parties, and if necessary, to take the same to the Supreme Court of the State of Oklahoma or the Circuit Court of Appeals. You are to stand all responsibility for the Petroleum Engineer services or any other expert services required in the prosecution of this action. You will not compromise or settle our claim without first obtaining the approval of the undersigned parties.

If the foregoing meets with your approval, you will please accept the same at the place hereinafter designated.

IN WITNESS WHEREOF, each of us have hereunto set our hand, this 24th day of January, 1961.

/s/ Frank Poafpybitty

Frank Poafpybitty

Thompson Poafpybitty

Thompson Poafpybitty

/s/ Carl Poafpybitty

Carl Poafpybitty

/s/ Louise Poafpybitty

Louise Poafpybitty

LaVerne Aitson

LaVerne Aitson

The above and foregoing employment and power of attorney is accepted by the undersigned, Houston Bus Hill, this 24th day of January, 1961.

/s/ Houston Bus Hill

Houston Bus Hill
1412 Liberty Bank Bldg.
Oklahoma City 2, Oklahoma

The above and foregoing Contract is hereby approved by the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, this ..... day of February, 1961.

Will J. Pitner

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ANADARKO AREA OFFICE

Anadarko, Oklahoma

Apr 6 - 1962

The foregoing contract between Frank Poafpybitty, Thompson Poafpybitty, Carl Poafpybitty, Louise Poafpybitty, and Laverne Aitson, and Houston Bus Hill, Oklahoma City, Oklahoma, for legal services in connection with a suit against Skelly Oil Company to recover damages for the wasting of natural gas from an approved oil and gas lease covering allotted Comanche lands in Stephens County, Oklahoma, is approved pursuant to authority contained in section 269 of Order Number 551 of the Commissioner of Indian Affairs (16 F.R. 2939, as amended), subject to the condition that:

The payment of compensation to the attorney shall be made upon a quantum meruit basis, after the legal services have been performed, in an amount to be determined after statement of services rendered has been submitted by the attorney, and shall be wholly contingent upon a recovery for the plaintiffs and the availability of funds.

/s/ Will J. Pitner
Area Director

The above conditions are hereby accepted:

Mr. Houston Bus Hill, Attorney at Law.

/s/ Houston Bus Hill

Leave granted to file May 31, 1963

s/s A. P. VAN METER,
JUDGE

ENDORSED: FILED, DISTRICT COURT, OKLAHOMA COUNTY, OKLA. May 31, 1:46 PM '63. DALE SMITH, COURT CLER, By C. Huddleston

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STRIKE FROM REPLY

Without waiving in anywise or to any extent its pending Demurrer to plaintiffs' Petition which said Demurrer is now being considered by the Court upon written Briefs,

The defendant, Skelly Oil Company, moves the Court severally to strike from plaintiffs' Reply recently filed herein: (1) All of paragraph numbered 2 thereof, (2) Exhibit A attached to such Reply, and (3) The letter of Will Pitner, Area Director, following and attached to said Exhibit A for each of the following reasons:

1. Said paragraph 2 contains allegations and references to extraneous matter which are wholly irrelevant, redundant, immaterial and constituting neither proper assertions nor defense against matters alleged in the Answer of this defendant or against said pending Demurrer;

2. Said paragraph, if proper at all which is denied, has no place in a Reply and is redundant and a departure;

3. Said "contracts", represented by said Exhibit A is insufficient, nonmutual, conditional, illegal, unauthorized, unapproved and incomplete and has no legal effect to authorize the institution and maintenance of this action by the plaintiffs; and

4/ Said letter of Will Pitner is without legal effect to change the established law, the statutes of Oklahoma, the decisions of the Supreme Court of Oklahoma, the Federal statutes and the rules and regulations of the Secretary of Interior promulgated pursuant to law, or any of them.

Respectfully submitted,

/s/ S. W. Wells

S. W. Wells
Skelly Building
Tulsa, Oklahoma

/s/ John H. Cantrell

John H. Cantrell
2120 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

On this 11th day of June, 1963, I served the above and foregoing Motion upon the plaintiffs in the above styled and numbered cause by mailing in envelopes properly addressed with postage prepaid, true and correct copies of said Motion to:

Chas. Hill Johns, Attorney at Law
Cravens Building
Oklahoma City, Oklahoma

and

Houston Bus Hill, Attorney at Law
Liberty Bank Building
Oklahoma City, Oklahoma

Dated this 11th day of June, 1963.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jun 11 8:50 AM '63

DALE SMITH, COURT CLERK

BY E. C. Brett

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

ORDER SUSTAINING DEMURRER

Now on this 1st day of July, 1963 there comes on for further hearing and decision upon the Demurrer of the Defendant, Skelly Oil Company, contained in its Amended Answer herein. The Plaintiffs appear by their attorney of record, Charles Hill Johns, and the Defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that after reading and fully considering the Briefs submitted to the Court by the parties the Court has concluded that the said Demurrer of said Defendant should be sustained. The Court therefore

finds and orders that said Demurrer be sustained, whereupon the Plaintiffs except and exceptions are allowed. The Plaintiffs then pray the Court for leave to file an Amended Petition herein within twenty (20) days from this date. Defendant objects to the granting of such leave upon legal grounds stated to the Court. The Court finds that such leave to file an Amended Petition should be granted and that Defendants objection thereto should be overruled to which the Defendant excepts and exceptions are allowed. Defendant then requests the Court to fix the time for the Defendant to plead or answer after the date of the filing of said Amended Petition by Plaintiffs and such request is granted.

IT IS THEREFORE ORDERED that the Demurrer of the Defendant, Skelly Oil Company, as contained in its Amended Answer herein be, and the same is hereby sustained to which the Plaintiffs except and exceptions are allowed. Plaintiffs are granted twenty (20) days from this date within which to file their Amended Petition herein to which the Defendant excepts and exceptions are allowed. Defendant is granted twenty (20) days from and after the date of the filing of Plaintiffs' Amended Petition herein within which to plead to or answer said Amended Petition.

Dated this 1st day of July, 1963.

/a/ A. P. VAN METER
DISTRICT JUDGE

O.K. as to form:

/s/ Houston Bus Hill
/s/ Chas Hill Johns
Attorneys for Plaintiffs

/s/ S. W. Wells
/s/ John H. Cantrell
Attorneys for the Defendant

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jul 12 8:28 AM '63

DALE SMITH, COURT CLERK

By C. Huddleston

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

AMENDED PETITION

COME NOW plaintiffs and for cause of action in their amended petition against the defendant, allege and state:

1. Plaintiffs reallege all the allegations contained in their original petition, and further state.

2. That defendant Skelly Oil Company is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Oklahoma, and it maintains its principal office and place of business in Tulsa, Oklahoma; that the service agent of the defendant is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

3. That plaintiffs are now and have been at all times hereinafter mentioned, the owners of a trust patent to the surface and all oil, gas and other minerals and mineral rights thereunder, and are in possession of the following described real property situated in Stephens County, State of Oklahoma, to wit:

> The Southeast Quarter of Section Three, in Township Two North of Range Eight West of the Indian Meridian, containing 160 acres.

That said lands are being held in trust by the United States Government, under the General Allotment Act of February 8, 1887, as amended, and said lands are under the jurisdiction and control of the Secretary of the Interior of the Department of Interior acting by and through the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, and the Commissioner of Indian Affairs.

4. That on May 28, 1947, the plaintiffs, Frank Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, and John T. Montgomery, Superintendent of Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor (now of age), as Lessors, made, executed and delivered to Skelly Oil Company, as lessee, a Departmental oil and gas lease covering the above described tract; that on June 27, 1947, said oil and gas lease was approved by J. W. Hutchison, Acting Commissioner of Indian Affairs of the United States Department of Interior; that said Skelly Oil Company also executed said oil and gas mining lease, and that a true and correct copy of said lease, with all endorsements thereon, marked Exhibit "A", are attached to the original petition filed herein, and by reference hereto are made a part hereof for all purposes. That the primary term of said lease was for a period of ten years from the approval date of the Secretary of Interior, which period expired on June 27, 1957, and contained a provision that said lease would remain in full force and effect as much longer thereafter as oil and gas was produced in paying quantities from said land.

5. That during the year 1956, Skelly Oil Company drilled seven oil and gas producing wells on said lands on 20-acre spacing, all of which wells have been duly completed. That shortly after said wells had been completed as commercial producers for oil and gas purposes upon said lands, demand was made by plaintiffs herein on Skelly Oil Company to market the gas being produced and flared from said wells, there being a gas line operated by Lone Star Gas Company within one-half mile of said lands. That

said defendant failed and refused to market said gas, and in addition thereto failed and refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises in direct violation of the express terms, conditions, and covenants of the aforesaid oil and gas mining lease, which is attached to the original petition herein marked Exhibit "A", and made a part of this amended petition by reference.

6. That as a direct and proximate result of the aforesaid wrongful and illegal conduct of defendant herein, plaintiffs have been damaged in the loss of royalty, resulting from the waste occasioned by the wrongful and illegal operations of said written oil and gas mining lease (Exhibit "A" to the original petition, and made a part hereof by reference, as aforesaid) in the amount of ONE HUNDRED FOURTEEN THOUSAND DOLLARS ($114,000.00), and that all of said damages are the direct and proximate result of the wrongful and illegal breach of said written agreement and covenants, as aforesaid, as of August 9, 1961.

7. Plaintiffs further state that all the damages herein alleged by them were damages sustained as a result of continuing and continuous tortious action on the part of defendant.

8. Plaintiffs further allege and show to this Honorable Court that plaintiffs are the real parties in interest in this controversy, and that the United States of America is trustee of the benefits to which plaintiffs are entitled to receive in this action, and that the United States of America has consented to plaintiffs instituting this cause of action against defendant, and has authorized plaintiffs to employ attorneys for the prosecution of this action.

9. Plaintiffs further allege and show that the recovery herein to which plaintiffs are entitled to have and receive should be received and paid in accordance with the laws of the United States pertaining to the premises.

Plaintiffs reserve the right to further amend, at the date of trial hereof, and to set forth any additional damages which may have resulted in any continuous damages in the premises.

WHEREFORE, premises considered, plaintiffs pray for judgment against defendant in the amount of ONE HUNDRED FOURTEEN THOUSAND and NO/100 DOLLARS ($114,000.00), with interest and costs, and for such additional amount of damages which may have accrued at the date of the trial, the same to be paid as by law provided, and for such other relief as plaintiffs may be entitled to have and receive in the premises.

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ CHARLES HILL JOHNS
CHARLES HILL JOHNS

Attorneys for Plaintiffs

ATTORNEYS' LIEN RESERVED:

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ Charles Hill Johns
CHARLES HILL JOHNS

A copy of the within and foregoing amended petition was mailed to Mr. John H. Cantrell, attorney at Law, 2120 First National Building, Oklahoma City, Oklahoma, attorney for defendant, this 18th day of July, 1963.

/s/ Charles Hill Johns
CHARLES HILL JOHNS

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jul 19 10:27 AM '63

DALE SMITH, COURT CLERK

BY HARLAN SMITH

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STRIKE FROM AMENDED PETITION, DEMURRER TO AMENDED PETITION AND OBJECTION TO VENUE

Comes now the defendant, Skelly Oil Company, a corporation, and moves the Court to strike from the Amended Petition of the plaintiffs herein each of the following impertinent, redundant, irrelevant and immaterial matters contained in said Amended Petition, to-wit:

1. All of numerical paragraph 7, on page 3 of said Amended Petition;

2. Each of the following allegations found and contained in numerical paragraph 8, on page 3 of said Amended Petition:

(a) "that plaintiffs are the real parties in interest in this controversy,";

(b) "that the United States of America has consented to plaintiffs instituting this cause of action against defendant,"; and (c) "has authorized plaintiffs to employ attorneys for the prosecution of this action.".

DEMURRER

Said defendant demurs generally and specifically to the Amended Petition of the plaintiffs, and separately and severally to each separate alleged, asserted and pretended cause of action therein upon each, every and all of the following grounds, to-wit:

(1) Plaintiffs have no capacity to maintain this action;

(2) Plaintiffs have no legal title to the choses in action sought to be asserted by them;

(3) The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that plaintiffs are not the proper parties to institute and maintain this suit;

(4) The said Amended Petition shows on its face that plaintiffs cannot recover in this action;

(5) Plaintiffs are not the real parties in interest within the intent, meaning and contemplation of the Oklahoma Statutes prescribing who may institute and maintain an action of this kind;

(6) Said Amended Petition shows on its face that conditions precedent to recovery have not been performed;

(7) Said Amended Petition shows on its fact that plaintiffs have not exhausted their administrative remedy or attempted to do so and said Amended Petition wholly fails to allege that plaintiffs have even sought to avail themselves of administrative remedies available to them and prescribed by law;

(8) Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against this defendant;

(9) This Court is without jurisdiction over the subject matter of this action if, and as far as, any cause of action attempted to be asserted by plaintiffs sounds in tort; and

(10) Said Amended Petition shows on its face that the applicable statute of limitations as contained in 12 O.S.A. S 95 bars recovery by plaintiffs.

Objection to Venue

This defendant asserts that if, and as far as, any cause of action and for any ground for recovery by plaintiffs sounds in tort or is asserted as a tort action, the venue is improperly laid and no venue exists therefor in Oklahoma County, Oklahoma, or in this Court and this defendant hereby asserts such want of venue, objects thereto and moves the Court for dismissal of such cause of action.

Respectfully submitted,

SKELLY OIL COMPANY, a Corporation,
Defendant.

By S. W. Wells /s/
Postoffice Box 1650
Tulsa 2, Oklahoma

/s/ John H. Cantrell
John H. Cantrell
CANTRELL, DOUGLASS, THOMPSON & WILSON
2120 First National Building
Oklahoma City 2, Oklahoma

Attorneys for the Defendant,
Skelly Oil Company

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 5th day of August, 1963, I served the above and foregoing Motion To Strike From Amended Petition, Demurrer to Amended Petition And Objection To Venue upon the plaintiffs in said cause by mailing to counsel of record for said plaintiffs in said cause, in envelopes properly addressed and with postage thereon fully prepaid, true and correct copies of said Motion To Strike From Amended Petition,

Demurrer To Amended Petition And Objection To Venue as follows, to-wit:

Houston Bus Hill, Attorney at Law
1409 Liberty Bank Building,
Oklahoma City 2, Oklahoma

Charles Hill Johns, Attorney at Law
Cravens Building
Oklahoma City 2, Oklahoma

Dated this 5th day of August, 1963.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG 5 9:29 AM '63

DALE SMITH, COURT CLERK

BY W. F. Miller, Jr.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

ORDER SUSTAINING DEMURRER AND JUDGMENT DISMISSING CAUSE

Now on this 20th day of September, 1963, there comes on for further hearing and decision upon the demurrer of the defendant, Skelly Oil Company, to the Amended Petition of the plaintiffs. The plaintiffs appear by their attorneys of record, Charles Hill Johns and Houston Bus Hill and the defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that the Court has concluded that the said demurrer of said defendant should be sus-

tained. The Court, therefore, finds and orders that said demurrer to said Amended Petition be sustained, to which finding and order of the Court plaintiffs and each of them except and exceptions are allowed. Plaintiffs elect to stand upon their said Amended Petition and decline to plead further, whereupon the Court finds and orders that plaintiffs' said Amended Petition and the above styled and numbered cause each should be and is hereby dismissed at plaintiffs' cost, to which actions of the Court the plaintiffs and each of them except and exceptions are allowed.

The plaintiffs, and each of them, thereupon give notice in open court of their intention to appeal to the Supreme Court of Oklahoma and ask and direct that such notice of intention to so appeal be entered upon the trial docket of the Court which is accordingly done. Plaintiffs, and each of them, having requested an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, in which to make and serve case-made upon such appeal, such request is granted and plaintiffs are hereby granted and allowed an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, within which to make and serve case-made upon appeal to the Supreme Court of Oklahoma. The parties are granted three days from and after the date of service of the said case-made within which to suggest amendments thereto with said case-made to be settled and signed upon three days notice in writing given by plaintiffs to defendant or by defendant to plaintiffs.

/s/ A. P. VAN METER
DISTRICT JUDGE

OK as to form:

/s/ Houston Bus Hill
/s/ Charles Hill Johns
Attorneys for Plaintiffs

/s/ John H. Cantrell
/s/ S. W. Wells
Attorneys for Defendant

ENDORSED:
FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Sep 25 11:37 AM '63
DALE SMITH, COURT CLERK
BY D. J. Fowler

FILED
In Supreme Court
of Oklahoma
NOV 15 1963
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON, Plaintiffs in Error,	
vs.	No. 40777
SKELLY OIL COMPANY, a corporation, Defendant in Error,	

PETITION IN ERROR

COME now Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, and each of them, Plaintiffs in Error, and complain of said Defendant in Error for that the said Skelly Oil Company at the July term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment; by the consideration of said Court, wherein the cause of action of Plaintiffs in Error was dismissed upon the Court sustaining a demurrer to the Amended Petition of Plaintiffs in Error,

in a certain action then pending in said Court wherein said Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson were Plaintiffs, and said Skelly Oil Company was Defendant. Original Case-Made duly signed, attested and filed is hereto attached, market Exhibit "A", and made a part of this Petition in Error; and the said Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, and each of them aver that there is error in said record and proceedings in this, to-wit:

1. Said Court erred in sustaining the Demurrer of the Defendant in Error to the First Amended Petition of Plaintiffs in Error, excepted to by Plaintiffs in Error.

2. Said Court erred in sustaining Demurrer and entering judgment dismissing cause to the Second Amended Petition of Plaintiffs in Error, excepted to by Plaintiffs in Error.

WHEREFORE, Plaintiffs in Error, and each of them, pray that said Order Sustaining Demurrer to Amended Petition of Plaintiffs in Error and Judgment Dismissing Cause may be reversed, set aside and held for naught, and that said cause be remanded directing the trial Court to set aside said judgment dismissing cause and overrule Demurrer of Defendant in Error to Plaintiffs in Error's Amended Petition, and for such other relief as to the Court may seem just.

Houston Bus Hill

HOUSTON BUS HILL
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma

Charles Hill Johns

CHARLES HILL JOHNS
815 Cravens Building
Oklahoma City 2, Oklahoma

ATTORNEYS FOR PLAINTIFFS
IN ERROR

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Petition in Error was mailed this 15th day of November, 1963, to the attorneys for the Defendants in Error, Mr. John H. Cantrell, First National Bank Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Tulsa 2, Oklahoma.

Houston Bus Hill

HOUSTON BUS HILL

FILED
Supreme Court
of Oklahoma
MAR 23 1964
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

MOTION TO DISMISS APPEAL

COMES now the Defendant in Error, Skelly Oil Company, a corporation, and moves the Court to dismiss this appeal and the cause attempted to be instituted and prosecuted thereby for each of the following reasons:

1. Neither the Transcript (case-made) nor the Petition in Error nor any other document filed herein contains the required Certificate by a Judge (or Clerk) of the trial court "specifically stating, by day, month and year the latest date by which the Petition in Error can be filed in the Supreme Court" to comply with 12 O.S., 1963 Supp. 972(c) and Sec. 956.2 referred to therein; and

2. No motion for new trial was filed in the trial court, as then obviously required by Sec. 12 O.S., 1963 Supp. Sec. 651.

The judgment sought to be appealed from herein was rendered on September 20, 1963 (Tr. Cm. pp. 96, 97-99).

12 O.S., 1963 Supp. 972 became effective as law on September 13, 1963. 12 O.S., 1963 Supp. 651 became effective as law on June 13, 1963.

No motion for new trial was filed in this cause. No required Certificate of the trial judge (or clerk) was obtained and none is of record herein.

Therefore, dismissal is mandatory and this Court has no jurisdiction to entertain or consider this appeal and has no discretion to exercise in the matter. The appeal must be dismissed.

A Brief in Support of this Motion is attached hereto and submitted herewith.

Respectfully submitted,

SKELLY OIL COMPANY, a corporation

By S. W. Wells
S. W. Wells
Skelly Building
Tulsa, Oklahoma

By John H. Cantrell
John H. Cantrell
2120 First National Bldg.
Oklahoma City, Oklahoma

ATTORNEYS FOR SKELLY OIL COMPANY,
A Corporation

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for the Defendant in Error in the above styled and numbered cause, do hereby certify that on the 23 day of March, 1964, I served the above and foregoing Motion to Dismiss Appeal upon the Plaintiff in Error in said cause by mailing in envelopes properly addressed with postage thereon fully prepaid, true, correct and complete copies of said Motion to the attorneys of record in said cause for said Plaintiff in Error, to-wit:

Charles Hill Johns
Attorney at Law
815 Cravens Building
Oklahoma City 2, Oklahoma

and

Houston Bus Hill
Attorney at Law
1801 First National Building
Oklahoma City 2, Oklahoma

Dated this 23 day of March, 1964.

John H. Cantrell

FILED
In Supreme Court
of Oklahoma
JUL 7 1964
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	[Officially Reported 394 P.2d 515]
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

SYLLABUS

1. Mere failure to attach a certificate specifying the latest date for the commencement of a proceeding in error in the Supreme Court does not render the "reception" of an appeal "inadvertent" within the meaning of 12 O. S. Supp., 1963, Sec. 972(c), and if an appeal be timely brought, its dismissal is not required by that statute.

2. By the terms of 12 O. S. Supp., 1963, Sec. 651, an error in determining an issue of law was placed in the same category as error occurring during the trial, and neither may be presented for review in the Supreme Court unless the aggrieved party assigned it in the motion for new trial which was acted upon and denied by the trial court.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Honorable A. P. Van Meter, Judge

MOTION BY DEFENDANTS IN ERROR TO DISMISS APPEAL FOR FAILURE TO COMPLY WITH THE PROVISIONS OF 12 O. S. SUPP., 1963, SECS. 651 and 972(c).

STATUTES CONSTRUED

MOTION DENIED

Charles Hill Johns,
Oklahoma City, Oklahoma
and
Houston Bus Hill,
Oklahoma City, Oklahoma,

of Counsel: Smith, Johns & Neuffer For Plaintiffs in Error

S. W. Wells,
Tulsa, Oklahoma
and
Cantrell, Douglass, Thompson & Wilson
Oklahoma City, Oklahoma, For Defendant in Error.

BERRY J:

In this proceeding in error by case made plaintiff below seeks review of an adverse judgment sustaining defendant's demurrer to the petition and dismissing the action. Defendant moved to dismiss the appeal urging two grounds:

(1) Plaintiff neglected to comply with the "mandatory" provisions of 12 O. S. Supp. 1963, Sec. 972(c) by his failure to timely procure and attach to the petition in error, or the case made, the required trial judge's certificate specifying the latest date for the commencement of this appeal; and

(2) Plaintiff neglected to comply with the "mandatory" provisions of 12 O. S. Supp. 1963, Sec. 651, because no motion for new trial was presented below and denied by the lower court, but the appeal is sought to be prosecuted directly from the adverse judgment.

The contentions, as outlined, present for our construction two recently enacted amendatory statutes. Both questions raised are of first impression. Their determination is urgently needed for the guidance of the bench and bar. Mindful of these considerations, the court directed that its disposition of defendant's motion be effected by an opinion to be promulgated in advance of the regular submission of this cause on its merits.

An appeal is governed by the provisions of the law which were in force and effect at the time the judgment sought to be reviewed was rendered. Mariett et al v. Newton, et al., 67 Okl. 150, 169 Pac. 488. The judgment under review was rendered on September 20, 1963,—12 O. S. Supp. 1963, Sec. 972(c), passed without an emergency clause, became effective ninety days after the adjournment of the 1963 legislative session, or on September 13, 1963. Art. 5, Sec. 58, Okla. Const. Therefore, the cited enactment was in force and effect when judgment was rendered herein and is applicable to this proceeding in error.

The terms of 12 O. S. Supp. 1963, Sec. 972(c), insofar as they apply hereto, require that every proceeding in error "shall have attached to it a certificate, executed by a judge of the trial court, specifically stating by day, month and year the latest date by which the petition in error can be filed in the Supreme Court . . ." in compliance with the applicable statutes. In the concluding sentence the Act provides that "In case of an inadvertent reception of such appeal, it shall be dismissed promptly by the Chief Justice . . ."

Defendant argues that plaintiff's failure timely to procure and attach the certificate prescribed by Sec. 972(c),

supra, operates to render the "reception" of this appeal "inadvertent" and requires its dismissal.

Sec. 972(c) forms a part of S.B. 50 and H. B. 558, S.L. 1963, pgs. 115, 241. Both bills are identical. According to their title, the Act requires "the dismissal of an appeal that is filed late." Viewed in the light of its own language, the title clearly provides that the appeals required to be dismissed are only those which are found to have been filed late.

In view of our constitutional provision requiring that the subject of a legislative Act shall be clearly expressed in its title, Art. 5, Sec. 57, Okla. Const., the Legislature is bound by its selection of a restrictive title and such title has the effect of limiting the text of an Act. The title itself will be construed with reference to the language employed in it alone and not in the light of what the body of the Act contains. Excise Board of Washita County v Lowden, 189 Okl. 286, 116 P. 2d 700, 702.

No contention is made here that this proceeding was brought too late. We conclude that mere failure to attach a certificate specifying the latest date for the commencement of a proceeding in error will not render the "reception" of an appeal "inadvertent." The dismissals commanded by Sec. 972(c), supra, relate to appeals which were in fact "filed late."

The other amendatory statute under consideration is H. B. 562, S.L. 1963, p. 326, 12 O. S. Supp. 1963, Sec. 651. By this enactment a re-examination of an issue of law became included in the statutory definition of a new trial. Defendant asserts that this inclusion makes it now *mandatory* that errors in resolving an issue of law be preserved for review by a motion for new trial. The question to be decided is, therefore, whether the amendatory Act in question *requires or merely authorizes* that a re-examination of an issue of law be sought by motion for new trial and that such motion be acted upon before errors assigned therein may be presented for review.

This is an appeal from the judgment entered for defendant upon sustaining its demurrer to plaintiff's petition. Before the amendment under consideration was enacted, the law stood firmly settled that (1) an appeal from lower court's order sustaining a demurrer to the petition and dismissing the action presents an error apparent upon the face of the judgment roll; (2) such appeal may be prosecuted directly from the judgment (without preserving the errors for review by motion for a new trial or formal exceptions) either by transcript of the record or by case made. 12 O. S. 300, 193 P 2d 306 308; Oxford v State, 80 Okl. 103, 194 Pac. 101; Stone v Clogston, 25 Okl. 162, 105 Pac. 642; Pure Oil Co v. Quarles, 183 Okl. 418, 82 P 2d 970; Commercial Discount Co. v. Navel, Okla., 385 P 2d 476, 478; and (3) a motion for new trial is neither necessary nor authorized to present for review errors in entering judgment for the defendant upon sustaining his demurrer to the petition. This is because the purpose of a motion for new trial (under Sec. 651, supra, before its amendment here under consideration) is to procure a re-examination of an issue of fact in the same court, and "there is no such thing as a new trial of issues of law." Clapper v Putnam Co. 70 Okl. 99, 158 Pac. 297, 298; Wagner v A. T. & S. F. R. Co., 73 Kan. 283, 85 Pac. 299; Chivers v Board of Com'rs. of Johnston County, 62 Okl. 2, 161 Pac. 822, 824.

In contrast to the rule just stated, errors *occurring during the trial* cannot be considered by the Supreme Court unless the aggrieved party has filed a motion for new trial, presented it to the lower court and met with adverse disposition thereof. Archerd v Ware, 115 Okl. 100, 242 Pac. 1943, 1044; Cogshall et al v Spurry, Kan., 38 Pac. 154, 155; Beall v Mutual Life Ins. Co. of New York, et al., 7 Okl. 285, 54 Pac. 474, 475; Bradford v Brennan, 15 Okl. 47, 78 Pac. 387, 388; Stinchomb et al v Myers, 28 Okl. 597, 115 Pac. 602, 603.

Plaintiff urges that a motion for new trial was not necessary here because the amendatory Act, H. B. 562, S.L. 1963, p. 326, cannot be viewed as repealing or abridging any existing provisions of the law which contemplate

or expressly authorize an appeal from the judgment alone in order to procure a review of errors apparent on the face of the judgment roll. Cited in support of this argument are 12 O. S. 1961, Secs. 952, 953, 956 and 972; all of which are said to reflect that an appeal may be taken from either a judgment or final order in the case. We are also urged that mere failure to file a motion for new trial does not require a dismissal of appeal, but at most operates to confine inquiry on review to those errors which appear on the face of the judgment roll. Hyre v Pratt, Okl., 382 P 2d 18, 21.

In testing the effect of the amendatory Act which included in the definition of a new trial a re-examination of an issue of law, we are reminded of the rule that:

> "A statute, as amended, is to be construed as a consistent whole, in harmony with common sense and reason, and every part should be given effect if possible. * * *" 82 C.J.S., Statutes, Sec. 384, p. 898.

> "* * * Amendments are to be construed together with the original act to which they relate as constituting one law, and also together with other statutes on the same subject . . . . as part of a coherent system of legislation; * * *" 82 C.J.S., Statutes, Sec. 384, p. 898.

> "* * * Where an amendment is subject to two constructions, either of which is warranted by its language, that is to be preferred which harmonizes with the act amended. If there is an irreconcilable conflict, the amendatory act will be counted as being the latest expression of the legislature; * * *" 82 C.J.S., Statutes, Sec. 384, p. 897.

In ascertaining the legislative intent, we must be aware that the lawmaking body amended Sec. 651, supra, with full knowledge of the existing law and that its provisions, as construed by this court, did then require rather than merely authorize a motion for new trial to procure review of errors occurring during the trial. Moreover, we

must presume that the Legislature, when adopting the amendment, had in mind such judicial construction. The duty is ours to now adhere to the construction previously placed upon Sec. 651, and to construe the original language and that contained in the amendment as a harmonious whole. 82 C.J.S., Statutes, Sec. 384, p. 900; Letteer v Conservancy District No. 30, in Tulsa, Osage, Rogers and Washington Counties, Okla., 385 P 2d 796. In the process of discovering that elusive quantity called "the legislative intent",

> "* * The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and *that construction of the amended act should be adopted which will best repress the evils and advance the remedy . . . .*" 82 C.J.S., Statutes, Sec. 384, p. 898. (Emphasis ours)

The mischief sought to be corrected by the amendment in Sec. 651 was the uncertainty and doubt which existed in many instances as to the necessity for a motion for new trial. The situation contributed to a dismissal of a large number of appeals, and in borderline cases caused a cautious practitioner to perfect both an appeal from the judgment and one from the order overruling motion for new trial. In re Fullerton's Estate, Okla., 375 P 2d 933.

It is clear that by amending Sec. 651, the Legislature intended and sought to place errors "occurring during the trial," whose preservation by a motion for new trial was mandatory in order to procure their review, in precisely the same category as errors in determining an issue of law, which under the prior law, the trial court had no authority to re-examine on motion for a new trial. The amendment clearly contemplated to give the same meaning and effect to issues of law as had previously been given to issues of fact. We hold that errors in resolving an issue of law may be presented for review only if such errors were assigned in the motion for new trial, and the motion was presented to, and acted upon by, the lower court. A contrary con-

struction of Sec. 651 would destroy the legislative purpose and perpetuate the odious and archaic distinction between two classes of errors—a distinction which the lawmaking body manifestly sought to eliminate from our procedure.

Where there are two or more acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable, but, if a repugnancy exists between such provisions, the more recent act, which is the latest expression of the legislative will, will operate as a repeal of the former to the extent of the repugnancy. 75 O. S. 1961, Sec. 22; Dunlap v Board of Com'rs of Carter County et al., 85 Okl. 295, 205 Pac. 1100, 1103. Any statutes presently in force which indicate that an appeal will lie to this Court either from a judgment or final order must be deemed repealed by implication to the extent that such language may be repugnant to and in conflict with the mandatory provisions of Sec. 651, supra, as amended by the 1963 Legislature.

The amendment to Sec. 651, supra, was clearly intended to remove a trap in our existing appellate procedure. The terse language of the amendment did not afford sufficient notice to the bench and bar of its far-reaching effect on procedure governing review in this Court. Our present pronouncement effects a drastic change of a crucial step in the perfection of an appeal. We are mindful that because of our decision many litigants, who relied upon the statutory provisions held in this opinion to have been repealed by implication to the extent of their repugnancy to Sec. 651, as amended, may lose their appeals. This, of course, would create the very opposite result from that which the Legislature desired by the change, since the amendment was manifestly designed to eliminate a serious trap in order to afford greater protection to the litigants.

Our pronouncement as to the necessity for filing motion for new trial to preserve, for review, errors in determining an issue of law, shall therefore operate prospec-

tively and apply with effect only to appeals in cases where judgment was rendered after this opinion becomes final. This course is taken to avert injustice and unnecessary hardship to litigants and to fully effectuate the legislative purpose. Oklahoma County v Queen City Lodge, 195 Okl. 131, 156 P 2d 340, 355; Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, 148; 77 L. Ed. 360, 85 A.L.R. 254.

Since our construction of Sec. 651, as amended, is held to apply prospectively only, the motion to dismiss is denied. BLACKBIRD, C.J., AND HALLEY, V.C.J., AND DAVISON, JOHNSON, WILLIAMS AND IRWIN, JJ: CONCUR.

FILED
Supreme Court
of Oklahoma
MAY 24 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	[Not Officially Reported]
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

SYLLABUS

1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil

and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY,

HON. A. P. VanMETER, JUDGE.

Action by Frank Poafpybitty et al against Skelly Oil Company for damages. From a judgment sustaining defendant's demurrer to plaintiffs' amended petition and dismissing the cause, plaintiffs appeal.

AFFIRMED

Charles Hill Johns, and
Houston Bus Hill,
Oklahoma City, For Plaintiffs in Error,

S. W. Wells, Tulsa, and
John H. Cantrell,
Cantrell, Douglass, Thompson & Wilson,
Oklahoma City, For Defendant in Error.

PER CURIAM:

This is a suit by the restricted Indian heirs of a member of the Comanche tribe of Indians to whom, as allottee, a tract of land in Stephens County was conveyed by a trust patent from the United States, in which the plaintiffs seek to recover from the defendant, Skelly Oil Company, lessee

under a departmental oil and gas lease, royalties on gas which the plaintiffs allege the company permitted to escape and go to waste from the land. From a judgment of the District Court of Oklahoma County sustaining the demurrer of the defendant to the amended petition of the plaintiffs and dismissing the cause on their refusal to plead further, this appeal was prosecuted.

In the amended petition the plaintiffs alleged that they are the owners and in possession of a quarter section of land in Stephens County, said land being held in trust for them by the United States Government under the General Allotment Act of February 8, 1887, said lands being under the jurisdiction and control of the Secretary of the Interior acting by and through the Area Director of the Bureau of Indian Affairs and the Commissioner of Indian Affairs; that on May 28, 1947, the plaintiffs, as lessors, executed and delivered to the defendant, Skelly Oil Company, as lessee, a departmental oil and gas lease which was approved by the Acting Commissioner of Indian Affairs of the United States Department of the Interior, for a primary term of ten years, which expired June 27, 1957, same to continue as much longer thereafter as oil and/or gas is produced in paying quantities from said land. A copy of the lease was attached to and made a part of the petition.

Plaintiffs further alleged that during the year 1956 the lessee drilled seven oil and gas wells on said land, all of which wells were completed as commercial producers; that shortly after the wells were completed demand was made by the plaintiffs on the lessee to market the gas being produced and flared from said wells, there being a gas line operated within a half mile from said land; that the defendant lessee failed and refused to exercise reasonable diligence in the prevention of waste of said gas as required by the lease, but, instead permitted the gas to escape and become wasted, contrary to the terms of the lease, causing the plaintiffs to lose their royalty from said escaping gas in the sum of $114,000.00, for which they prayed judgment.

Plaintiffs further alleged that they are the real parties in interest and that the United States is trustee for their benefit, and that the United States has consented to instituting this action by the plaintiffs and has authorized the plaintiffs to employ attorneys for the prosecution of the case.

The lease provides that the lessee shall pay to the Secretary of the Interior a royalty consisting of 12½% of the value or amount of all oil, gas, natural gasoline and all other hydrocarbon substances produced and saved from the leased land, save and except oil and/or gas used by the lessee for development and operation purposes on the leased premises, which shall be royalty free; that lessee shall furnish the Secretary of the Interior monthly statements showing the amount, quality and value of all such products produced and saved from the leased premises during the preceding calendar month; that the leased premises and wells, producing operations, improvements, machinery, and fixtures on said lease and connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior; that the lessee shall exercise reasonable diligence in drilling and operating wells for oil and gas purposes, and shall carry on all operations in a good and workmanlike manner in accordance with approved methods and practice having due regard for the prevention of waste of oil and gas developed on the land; shall carry out at its expense all reasonable orders and requirements of the oil and gas supervisor of the Department of the Interior relative to the prevention of waste and preservation of the property and the health and safety of workmen; that it shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to the lease; that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any wells drilled when in his judgment such action may be

necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor. The lease gives the Secretary of the Interior the right to declare the lease null and void, after notice and hearing, for violation of any of the terms and conditions of the lease *before restrictions are removed*, "provided that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The plaintiffs argue the case under two propositions:

1. That as beneficial owners of the land and lessors they have the right to maintain this action, notwithstanding the fact that as Indian Citizens they hold equitable title under a Trust Patent and the lease was required to be approved by the Commissioner of Indian Affairs, citing 42 C.J.S. Indians, sec. 8, page 653; Smith v. Northern Pacific Rep. Co., 57 Mont. 14, 186 P. 684, 686; Sadler v. Public National Bank and Trust Co. of New York, 172 F.2d 870; Bonnet v. Seekins, 243 P.2nd 317 (Mont.); Brown v. Anderson, 160 P. 724, 61 Okl. 136; Choctaw and Chicasaw Nations v. Seitz, 193 F.2d 456.

2. That as such beneficial owners, they have the right to maintain this action without joining the United States, which holds the land as trustee for them, citing Bush v. Missouri State Life Ins. Co., 207 P. 317, 86 Okl. 182; Smith v. Burt, 150 Okla. 34, 300 P. 748; Siniscal v. United States, 208 F.2d 406.

The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action.

The defendant calls attention to numerous rules and regulations promulgated by the Secretary of the Interior dealing with such departmental oil and gas leases, which

have the force and effect of law, and of which the Federal and State courts take judicial notice. Diehl v. Phillips Petroleum Co., 376 P.2d 203 (Okl.); Seber v. Spring Oil Co., 33 F.Supp. 805. The regulations so prescribed among other things, define the duties of the supervisor, who is a representative of the Secretary of the Interior, under directions of the Director of the United States Geological Survey, in supervising and directing oil and gas operations. Among such regulations that are pertinent to the questions here involved are those appearing at 7 F.R. 1433-4135-4140 and Title 30, Code Of Federal Regulations (CFR), January, 1966 Revision, in part, as follows:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary

widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. * * *."

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor. * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor. * * *."

Tit. 25 CFR, sec. 172.23 provides in part:

> "(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated. * * *."

The regulations provide for appeals from orders made, under the regulations to the Director and from the Director to the Secretary, and procedure for such appeals is prescribed.

We do not find the authorities relied upon by the plaintiffs helpful in deciding their right to prosecute this action and recover judgment. None of those authorities deals with the rights and liabilities of the parties to a Departmental oil and gas lease giving the Secretary of the Interior and his subordinates wide authority over the development and operation of such leases as is the case under the terms of the lease and the regulations that apply to it, made pursuant to the law and the terms of the lease, which are herein quoted. Nor does the defendant cite any cases dealing specifically with the rights of lessor under such a lease.

The Secretary of the Interior is in effect made guardian of the restricted Indian lessors in dealing with the lessee in the development and operation of the lease and the lessors are given no express authority to deal with the lessee in its development and operation. The lessee is required to comply with the written directions of the Supervisor in carrying out the terms of the lease and applicable regulations, and the Secretary of the Interior may cancel the lease on application of the lessors for failure of the lessee to comply with the provisions of the lease or regulations, and there is no allegation in the petition that the defendant has failed to comply with any directions given it by the Supervisor. The exclusive authority of the Secretary of the Interior and his subordinate officers shall continue so long as the restric-

tions on the Indian lessors are in effect. In paragraph 6 of the lease, it is provided "that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee." We think, under the maxim *"expressio unius est exclusio alterius"*, this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed.

The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in developing and operating the lease, and in the absence of a violation of any such direction it is not liable in a suit for damages. The fact that the United States authorized the plaintiffs to employ counsel and consented to the filing of the suit as alleged in plaintiffs' petition did not create a cause of action in favor of the plaintiffs contrary to the terms of the lease and the rules and regulations promulgated by the Secretary of the Interior.

The trial court properly sustained the demurrer to the amended petition.

Judgment affirmed.

The Court acknowledges the services of Thurman S. Hurst, who with the aid and counsel of George S. Downey and David L. Fist, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the Court. The Chief Justice then assigned the case to Blackbird, J., for review and study, after which and upon consideration by the Court, the foregoing opinion was adopted.

JACKSON, V. C. J., and DAVISON, WILLIAMS, IRWIN, BERRY, HODGES and LAVENDER, JJ., concur.

FILED
In Supreme Court
of Oklahoma
JUN 7 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, June 7, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

40777—Frank Poafpybitty, et al v Skelly Oil Co.
Plaintiffs in Error granted until June 23, 1966, to file Petition for Rehearing.

Harry L. S. Halley,
Chief Justice.

FILED
In Supreme Court
of Oklahoma
JUN 21 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, June 21, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

40777—Frank Poafpybitty et al v Skelly Oil Co.
Plaintiffs in error granted until July 8, 1966, to file Petition for Rehearing. This extension is final.

Harry L. S. Halley
Chief Justice

FILED
Supreme Court
of Oklahoma
JUL 5 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

PETITION FOR REHEARING

COME NOW Plaintiffs in Error and respectfully show to this Honorable Court that the opinion and judgment of this Court promulgated and rendered herein on May 24, 1966, overlooked decisive questions of law and fact, appearing herein, which entitle plaintiffs in error to a rehearing in this case, as follows:

1. This Court in its opinion and judgment construed Laws of the United States, to-wit: 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January, 1966 Revision, Sections 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60, and Title 25 C.F.R. Section 172.23, and the said opinion and judgment of this Court is in direct conflict with decisions of the United States Court of Appeals of the Tenth Circuit, and the Supreme Court of the United States.

2. The opinion and judgment of this Court predicated its decision upon the legal maxim "Expressio unius est exclusio alterius" and in said opinion and judgment has

overlooked previous decisions of this Court defining the application of this legal maxim, and has overlooked and misconstrued the separate covenants and provisions of the lease itself, and said opinion and judgment is exactly contrary to the settled judicial construction of the United States Courts upon such Federal Regulations and Departmental Indian Oil and Gas Mining Leases.

3. That the laws of the United States providing for Departmental Oil and Gas Leases upon Restricted Lands of Certain Indians, and all Federal Regulations pertaining thereto, are solely for the protection of such Indian Lessors, and cannot be interposed by a Lessee to avoid liability for the breach of express and implied covenants of such oil and gas mining lease.

4. That the opinion and judgment of this Court in construing said Federal Laws, and said Departmental Oil and Gas Lease so as to deny plaintiffs in error the right to institute and maintain this action violates and offends the rights of plaintiff in error under the Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the Unied States and deprives plaintiffs in error of their property without due process of law.

WHEREFORE, plaintiffs in error pray that a Rehearing be granted herein. Brief attached hereto.

Chas. Hill Johns

CHARLES HILL JOHNS
815 Cravens Building
Oklahoma City, Oklahoma

Houston Bus Hill

HOUSTON BUS HILL
First National Building
Oklahoma City, Oklahoma

ATTORNEYS FOR PLAINTIFFS IN ERROR

FILED
In Supreme Court
of Oklahoma
DEC 20 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, December 20, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOW-LOWING ORDERS:

* * *

40777—Poafpybitty, et al v Skelly Oil Co.
Rehearing and oral argument denied.

Harry L. S. Halley,
Chief Justice.

FILED
Supreme Court
of Oklahoma
FEB 1 1967
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STAY MANDATE AND FOR CLERK TO TRANSMIT ORIGINAL OF COPIES OF RECORD

Plaintiffs in Error move this Court to stay the Mandate in this case pending the outcome of their petition to the Supreme Court of the United States in this cause.

Notice of appeal has been duly filed.

Plaintiffs in Error also request the Court to order the Clerk to transmit either the original record or copy if available of the designated certiorari record herein.

Chas Hill Johns

CHARLES HILL JOHNS
218 Oklahoma Journal Building
Midwest City, Oklahoma

Houston Bus Hill

HOUSTON BUS HILL
1415 First National Building
Oklahoma City, Oklahoma

Attorneys for Plaintiffs in Error

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Motion to Stay Mandate was mailed this 1st day of February, 1967, to the attorneys for defendant in error, Mr. John H. Cantrell, 2120 First National Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Skelly Building, Tulsa, Oklahoma.

Chas Hill Johns

Charles Hill Johns

FILED
Supreme Court
of Oklahoma
FEB 1 1967
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

NOTICE OF PETITION FOR CERTIORARI AND APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, plaintiffs in error herein, hereby give notice of appeal to the Supreme Court of the United States from the judgment and opinion of the Supreme Court of the State of Oklahoma, entered in this case on May 24, 1966, and the order and judgment denying petition for rehearing herein, on December 20, 1966, and the order and judgment denying the second petition for rehearing on January 31, 1967.

2. This appeal is taken pursuant to Title 28, U.S.C. Sections 1257 (2), (3) and Section 2101 (c) and Rule 19 of The Supreme Court of the United States.

3. The Clerk of the Court will please prepare a transcript of the record herein for certiorari and transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Copy of the Casemade herein.

b. Copy of the opinion and judgment of the court herein filed May 24, 1966.

c. Copy of all Briefs filed herein.

d. Copy of Petition for Rehearing and Brief of Plaintiffs in Error, and Order denying same.

e. Copy of Second Petition for Rehearing and Brief of Plaintiffs in Error and Order denying same.

f. Copy of this Notice.

Questions Presented

The following questions are presented by this appeal.

1. That the Supreme Court of the State of Oklahoma in its opinion and judgment herein construed Laws of the United States, and construed erroneously a Departmental Oil and Gas Mining Lease of restricted Indian lessors made and executed pursuant to the Laws of the United States and said opinion and judgment of the Supreme Court of Oklahoma is in conflict with and contrary to decisions of the United States Court of Appeals of the Tenth Circuit and the Supreme Court of the United States.

2. That the opinion and judgment of the Supreme Court of Oklahoma in construing the terms and provisions of the Departmental Indian Oil and Gas Mining Lease involved and the Federal Regulations pertaining thereto, i.e., 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Sections 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60, and Title 25 C.F.R. Section 172, 23, misconstrued the separate covenants and provisions of the lease itself, and erroneously construed said Federal Regulations pertaining thereto, said opinion and judgment of the Supreme Court of Oklahoma being exactly contrary to the settled judicial construction of the United States Court of Appeals of the Tenth Circuit and the Supreme Court of the United States concerning Departmental Indian oil and gas mining leases and Federal Regulations pertaining thereto.

3. That the Laws of the United States providing for Departmental oil and gas mining leases upon restricted lands of certain Indians, and all Federal regulations pertaining thereto, are solely for the protection of such Indian lessors, and such regulations cannot be interposed properly

by a lessee to avoid liability to such Indian lessor for the breach of express and legally implied covenants of such an oil and gas mining lease.

4. That the opinion and judgment of the Supreme Court of Oklahoma herein, in denying plaintiffs in error (Indian lessors) the right to institute and maintain this action for breach of the covenants of said Departmental oil and gas lease, when the United States after due notice elected to not enter into this case, violates and offends the rights of plaintiffs in error (Indian lessors) herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives plaintiffs in error of their property without due process of law.

5. The opinion and decision herein is the result of a preliminary advisory opinion of Thurman S. Hurst, George S. Downey and David L. Fist, private attorneys. Plaintiffs in error submit that the opinion and decision herein violates and offends against Article 7, Section 5, and Article 2, Section 6, Constitution of Oklahoma, in that there is no authority in the Constitution or the Laws of the State of Oklahoma authorizing any private attorney, or panel of private attorneys, to prepare an opinion for the Supreme Court of Oklahoma, advisory or otherwise. Further Article 2, Section 6, Constitution of Oklahoma provides that the Courts of Oklahoma shall be administered without prejudice, and the said opinion prepared by said private attorneys in this cause has prejudiced the rights of plaintiffs in error herein as the said opinion of said private attorneys herein has influenced this court in adopting the opinion and decision herein as an opinion and decision of this court, thereby depriving plaintiffs in error of their property without due process of law contrary to Article 2, Section 7, Oklahoma Constitution and contrary to the Fourteenth (14th) Amendment to the Constitution of the United States.

6. The opinion and decision herein violates and offends against the rights of plaintiffs in error, citizens and

residents of the United States under Article 1, Section 1, Article 2, Section 7, Constitution of Oklahoma, and under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States in that the opinion and decision herein has deprived plaintiffs in error of their property without due process of law contrary thereto.

Chas Hill Johns

CHARLES HILL JOHNS
218 Oklahoma Journal Building
Midwest City, Oklahoma

Houston Bus Hill

HOUSTON BUS HILL
1415 First National Building
Oklahoma City, Oklahoma

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Notice of Appeal was mailed this 1st day of February, 1967, to the attorneys for defendant in error, Mr. John H. Cantrell, 2120 First National Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Skelly Building, Tulsa, Oklahoma.

Chas Hill Johns

Charles Hill Johns